UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

A M S REALTY COMPANY, L.L.C., and
SUTTER GARDENS ASSOCIATES
Joint Employers[1]

and Case No. 29-RC-9202

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32E, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Leslie Breeding, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.[3]

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1 The name of AMS Realty Company, LLC, appears as amended at the hearing.

2 The undersigned Regional Director hereby amends the transcript sua sponte as follows: All references to the Employers' location at "Skank" Avenue should be spelled "Schenck" Avenue.

3 In response to a special appeal filed by the Employer during the hearing, I have already affirmed the Hearing Officer's decision to revoke the Employer's subpoena, for reasons given in a written Order (Board Exhibit 5) which will not be reiterated here.

2. The record indicates that AMS Realty Company, LLC (herein called AMS), a New York limited liability corporation with its principal office and place of business at 98 Cutter Mill Road, Great Neck, New York, is engaged in real estate management. Sutter Gardens Associates (herein called Sutter Gardens), a New York limited partnership, owns a residential apartment complex in the East New York area of Brooklyn, with an office address of 425 Schenck Avenue, Brooklyn, New York. The parties stipulated that AMS and Sutter Gardens (herein collectively called the Employers) are joint employers of the petitioned-for employees who work at the Sutter Gardens complex. The parties also stipulated that, during the past 12 months, the Employers, in the course and conduct of their business operations of owning and managing real estate, collectively derived gross revenues in excess of $500,000, and collectively purchased and received at the Brooklyn facility, goods and materials valued in excess of $5,000, directly from suppliers located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that AMS and Sutter Gardens are joint employers, that they are engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The record reveals that Service Employees International Union, Local 32E, AFL-CIO, herein called the Petitioner or Local 32E, is an organization in which employees participate and which exists for the purpose of dealing with employers concerning employees' grievances, wages and other conditions of work. Specifically, Petitioner's Vice President, James Taylor, testified that the organization has dealt with various employers, including a cleaning contractor called ISS, and a multi-employer

association called the Realty Advisory Board. The Petitioner's contracts with these employer entities govern such working conditions as employees' wages and job classifications. Finally, Taylor testified that employees participate, *inter alia*, in Petitioner's contract negotiations and grievance procedures. Therefore, it is clear that the Petitioner is a labor organization as defined in Section 2(5) of the Act. *See also* Alto Plastics Mfg. Corp., 136 NLRB 850 (1962).

During the hearing, the Employers sought to subpoena the Petitioner's charter from its parent organization (Service Employees International Union, herein called SEIU) and any other documents showing the Petitioner's "geographical jurisdiction." The Employers argued that Local 32E may not be a "bona fide" labor organization for the purpose of representing employees in Brooklyn if its "geographical jurisdiction" was somehow limited to other areas. (It appears the Employers believed that Local 32E's "jurisdiction" may be limited to Connecticut, and to the Bronx and Westchester Counties in New York.) The Employers have not cited any legal authority whatsoever to support this proposition, other than comparing it to sections of the Act which were repealed 40 years ago.[4] In fact, the Act contains no requirement for labor organizations to be "bona fide" in a geographical sense or in any other sense. I therefore reject this baseless

[4] During the hearing, the Employers' attorney supported its contention -- that a labor organization must be "bona fide" in order to seek an election and certification -- by mentioning the former non-certifiability of labor organizations affiliated with the Communist Party. The Employers apparently refer to Sections 9(f)-(h) of the Taft-Hartley Act, which were repealed in 1959 as part of the Landrum-Griffin Act.

and frivolous contention.[5] If the SEIU has any mechanism for dividing geographical areas among its locals, it would be a strictly internal union matter, having absolutely no bearing on whether Local 32E meets the Act's definition of "labor organization."

For reasons discussed above -- including Petitioner's dealings with employers regarding wages and other working conditions and employees' participation therein -- I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and that it claims to represent certain employees of the Employers herein.

4. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner herein seeks to represent a wall-to-wall unit of employees employed by the Employers at the Sutter Gardens apartment complex at 425 Schenck Avenue in Brooklyn, including the "superintendent, porters, handymen, and other maintenance employees, and clerical staff." Three areas of dispute have arisen with respect to the unit. First, the Employers assert that the superintendent is a supervisor as defined in Section 2(11) of the Act, and therefore must be excluded from the unit. Second, the Employers claim that the clerical employee must be excluded because she does not share a community of interest with the maintenance employees. Third, the Employers assert that painters who periodically paint the apartment buildings are independent contractors, whereas the Petitioner claims they are maintenance employees

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[5] In pondering the genuineness of the Employers' position, one cannot help but note the total lack of legal foundation for it. One also has to wonder whether they would hesitate to file an unfair labor practice charge if, for example, Local 32E engaged in secondary activity prohibited by Section 8(b)(4) of the Act. (If Local 32E is not a "labor organization" under Section 2(5) then, of course, Section 8(b) of Act would not apply to it.) The Board has found that raising frivolous issues, for the purpose of obstruction, delay or other inappropriate purposes, may serve as the basis for disciplinary action.

employed by the Employers. In effect, the Employer argues that the only appropriate unit herein would be limited to the handymen[6] and porters. The Petitioner has indicated its willingness to proceed to an election in any unit found appropriate herein.

In support of their position on the unit issues, the Employers called Abram Shnay, a manager from the AMS Realty office in Great Neck, to testify. The Petitioner called the clerical employee who works at the Schenck Avenue location, Martha Salce, to testify. Neither the superintendent nor any painters were called to testify.

Overview of Employers' operations

As stated above, the Employers own and operate the Sutter Gardens apartment complex on Schenck Avenue in Brooklyn. The complex contains a total of 258 apartments, in 10 three-story buildings. There is also a separate building with an office, a community room, laundry room, storage rooms, and other common areas. The apartments are so-called Section 8 apartments, subsidized and regulated by the U.S. Department of Housing and Urban Development for low-income tenants.

Shnay testified that the site manager, Gene Genzer, has overall responsibility for managing the Sutter Gardens site. Genzer works primarily in AMS' office in Great Neck, but he has a desk in the Schenck Avenue office and usually visits the site five days per week. Genzer also manages one or two other sites for AMS, but Sutter Gardens is by far his largest site.

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6 At the time of the hearing, all six "handymen" employed by the Employers at Sutter Gardens were in fact male. For lack of a better term, "handymen" is used generically herein to identify the job classification, although it obviously could include women as well.

Other than Genzer, at the time of the hearing, the Employers' employees at Sutter Gardens included 1 superintendent, 6 handymen, 3 porters and 1 clerical employee. There is no history of collective bargaining at this site.

The handymen work Mondays through Fridays, 8:00 AM to 5:00 PM. Although their duties were not specifically detailed on the record, it appears that they perform repairs at the apartment buildings. Handymen are paid an hourly rate, ranging from $7.50 to $8.50 per hour.

The porters work the same hours as the handymen. It appears that the porters primarily perform cleaning work at the site. They are also paid an hourly rate, ranging from $6.50 to $7.50 per hour.

The handymen and porters receive one or two weeks of paid vacation, depending on their length of service. They are also eligible for a Christmas bonus. They do not receive any medical benefits. They do not wear uniforms.

Superintendent

The Employers' position regarding the superintendent's status is based primarily on the testimony of Abram Shnay, a manager who works in the AMS office in Great Neck. During cross examination, Shnay admitted that he visits the Sutter Gardens site only once or twice per month. As the following summary of his testimony suggests, Shnay did not have detailed, first-hand information as to the day-to-day operations at Sutter Gardens. For example, he did not know the last name of the superintendent about

whom he was testifying.[7] For some reason, the Employers chose to call neither the superintendent nor Genzer, the on-site manager, to testify.

The superintendent, identified herein as Miguel, lives in one of the Sutter Gardens apartments. He is paid $350 per week,[8] plus the use of an apartment and some utilities. He is generally expected to work from 8:00 AM to 4:00 PM, Monday through Friday, although he must also be available at other times in cases of emergency. (It appears that Miguel can be reached at all times, although it is unclear from Shnay's testimony whether Miguel has a "beeper," walkie-talkie and/or an emergency telephone number.) Although Miguel is paid on a salary basis, he may receive additional pay if he is required to work substantial hours on a Saturday or Sunday. The superintendent earns more per week ($350) than the porters and handymen earn for 40 hours of work per week ($260-300 for porters, $300-340 for handymen).

Shnay testified that the superintendent spends part of his time working in and around the Sutter Gardens apartment buildings, and part of his time working in the office there. Shnay did not know specifically whether Miguel has a desk in the office. It is not clear from the record how much time Miguel spends doing "hands on" work to help maintain the property, and how much time he spends overseeing or coordinating other employees.

Shnay testified that both the superintendent and the site manager assign work to

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7 Shnay first testified that the superintendent's name is Miguel Aug, then said it may be Miguel Cruz.

8 Early in the hearing, Shnay testified that he "thinks" Miguel earns $450 per week. Then, after Shnay contacted his office during a lunch break, he stated that someone in his office told him that Miguel earns $350 per week.

the porters and handymen. Generally, the porters' cleaning work is assigned on a rotating basis, e.g., washing and stripping the floors of a different building each day. The handymen's repair work is done as needed, e.g., based on repair requests made by tenants. Shnay testified generally that the superintendent determines which employees are going to perform the work. However, in response to questioning from the Hearing Officer, Shnay admitted that he did not know of any specific examples of Miguel assigning work to employees. According to the clerical employee, Martha Salce, who takes complaints from the tenants, the handymen's assignments are also determined to some extent by the "schedule" she creates, using the chronological order in which the repair-requests are written and also putting more urgent repairs first.

In response to leading questions from the Employers' attorney regarding whether porters report to the superintendent, and whether the superintendent checks their work, Shnay answered affirmatively.

AMS establishes the pay rates of employees in the petitioned-for unit. The superintendent does not establish employees' initial pay rates, does not grant wage increases, and does not decide on employees' Christmas bonuses.

In response to a question from the Petitioner's attorney, asking whether Miguel can "say" to a porter "from now on you're a handyman," Shnay responded affirmatively. It is not clear if this was intended to mean that the superintendent has actual authority to promote employees, or merely to communicate management's decision to employees. In any event, when asked by the Hearing Officer whether he knew of any specific

examples of this, Shnay responded no. At another point, Shnay said that Miguel "probably" cannot promote employees at this point in time.[9]

Miguel does not attend the management meetings held every week at the AMS office in Great Neck, although Shnay testified that he (Shnay) and his father talk to the superintendent and/or the site manager on an informal basis during their occasional visits to the Sutter Gardens site. Shnay initially testified that employees may bring their grievances to the superintendent or the site manager. However, when pressed for details, Shnay admitted that he does not actually know that any employees have brought their grievances to Miguel, explaining: "I can't say specifically, because when I hear it, it's through the site manager. Whether he [the site manager] heard it from the employees or through the superintendent, I don't know." Shnay later explained that, during the weekly management meetings at AMS, site managers report employees' grievances, and then "management" decides how to deal with the grievances. When the site manager returns to the site, he may either directly tell the employee of management's decision, or he may indirectly communicate management's decision via the superintendent. However, there is no evidence that the superintendent has independent authority to adjust grievances.

Shnay initially testified that the superintendent has authority to lay off employees, but he knew of no specific instances when Miguel had laid off any employees. He then explained that, during slow periods, management at the AMS office

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9 Shnay stated that Miguel has been a superintendent at Sutter Gardens for only a year and a half, and therefore that the Sutter Gardens site manager has more oversight, as compared to other sites where the superintendents have more experience. Specifically as to promotions, Shnay testified that although superintendents at other sites can promote employees, Miguel "probably" cannot promote employees yet.

generally tells the site managers to lay off two or three people, and that "whether he [the site manager]

specifically tells them they are laid off or whether he tells the super[intendent] to tell them they're laid off, I don't know." There is no evidence that the superintendent has authority to decide the layoffs. Shnay also stated that the superintendent cannot transfer employees to another site.

According to Shnay, the superintendent may grant employees a couple of hours off (e.g., if they have a doctor's appointment) without asking the site manager. However, Shnay did not know any specific instances where the superintendent had granted time off.

Early in the hearing, Shnay testified that if the superintendent is dissatisfied with a porter or handyman's work, he can ask them to re-do it. If the superintendent is still not satisfied, he can report the employee to the site manager and possibly recommend discipline or discharge. Shnay did not know any specific instances when the superintendent disciplined any employees or effectively recommended discipline. Similarly, Shnay did not know of any instances where the superintendent recommended discharging any employees, explaining only that "I *assume* that in the course of his tenure there at some point he has recommended the dismissal of someone" (emphasis added). Then, after Shnay contacted his office during a break in the hearing, he proceeded to give an example, in what was clearly hearsay testimony. Specifically, Shnay stated that the site manager (Genzer) just told him on the telephone that Miguel had fired an employee named Angel Diaz in early December, 1998, after Diaz supposedly refused to perform certain duties which Miguel had asked him to perform.

According to Shnay's testimony regarding what Genzer said that Miguel did,[10] Miguel supposedly fired Diaz "on the spot," without consulting the site manager first. When the Petitioner's attorney attempted to cross-examine Shnay on this topic, Shnay did not actually know the specifics, but instead gave speculative answers about what he "assumed" happened, based on what Genzer had just told him. The Hearing Officer asked the Employers' attorney whether he intended to call the site manager as a witness, and he responded no.

Shnay gave similar testimony regarding the superintendent's alleged involvement in hiring employees. Initially, Shnay gave general testimony that, although the site manager normally interviews and hires new porters, the superintendent can also hire porters. However, Shnay did not know specifically whether Miguel had interviewed or hired any porters. Later in the hearing, after the lunch break, Shnay proceeded to testify that Genzer had just told him that Miguel was recently involved in evaluating applicants for two handymen positions. According to this hearsay testimony, after Genzer interviewed the applicants, Miguel made some kind of evaluation. Shnay explained: "I guess [he] asked them to make maybe possibly certain repairs or do certain things, I'm not sure exactly what." Shnay concluded by testifying that, based on Miguel's "recommendations," Genzer hired both applicants. As noted above, neither Genzer nor Miguel were called to testify.

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered

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10 Of course, this testimony may actually be *double* hearsay if Genzer did not witness the discharge first-hand. In other words, Shnay related what Genzer told him on the telephone which, in turn, may have been based on what Miguel (or someone else) told Genzer.

supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Company, Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. Tuscan Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not merely "routine" in nature.

In the instant case, the Employers have not met their burden of proving that the superintendent, Miguel, is a supervisor as defined in the Act. At most, he possesses some low-level authority to assign and oversee employees, but without using independent judgment and without exercising any real supervisory authority over their employment status.

For the most part, Shnay's testimony consisted of speculative, conclusionary statements about Miguel's alleged supervisory powers, without any first-hand knowledge, specific examples, or any other foundation. For example, Shnay testified that Miguel assigns work to employees, but was unable to cite a single example of Miguel doing so. In any event, there is no evidence to show that such assignment would involve independent judgment. Indeed, Salce's role in organizing the repair orders also suggests

the routine, clerical nature of such assignment. Shnay also testified that employees may bring their grievances to Miguel, but then admitted that he does not actually know whether employees bring grievances to the superintendent or site manager. And, there is no evidence that Miguel has authority to adjust employees' grievances, as opposed to merely communicating information back and forth between employees and management. Similarly, Shnay initially asserted that Miguel can lay off employees, but knew of no specific examples. Shnay then admitted that AMS management makes the layoff decisions, and that he did not even know whether the superintendent communicated the information to employees. Shnay also testified that Miguel may grant a few hours off to employees, but did not have any examples or other basis for this testimony. These kind of conclusionary statements, without specific and competent evidence to support them, are insufficient to establish supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Similarly, Shnay's testimony that Miguel has authority to hire employees and to recommend their discipline and discharge was initially unsupported by any specific examples or foundation whatsoever. These conclusionary statements, by themselves, do not prove that Miguel actually possessed or exercised any such authority. Sears, Roebuck, supra. After the lunch break, Shnay then relayed what Genzer supposedly told him about what Miguel supposedly did (discharging Angel Diaz, and recommending the hire of two handymen). This testimony was clearly hearsay in nature, if not double hearsay. The inherent unreliability of this kind of evidence became obvious when the Petitioner attempted to cross-examine Shnay about the alleged discharge, and Shnay had no first-hand knowledge of the facts, such as whether Miguel checked with Genzer

before the discharge, or merely informed Genzer of it after the fact. Shnay could only state what his "understanding" was and what he "assumed." Consequently, Shnay's testimony did not

-- and could not -- make a complete record as to Miguel's alleged actions. Despite inquiries from the Hearing Officer, the Employers' attorney stated that they had no intention of calling Genzer as a witness, and that they made no attempt to obtain any documentation to corroborate Shnay's testimony. Finally, there was no showing that either Genzer or Miguel were unavailable as witnesses.

The Board may admit hearsay evidence in some circumstances, if it is "rationally probative in force and if corroborated by something more than the slightest amount of other evidence." RJR Communications, Inc., 248 NLRB 920, 921 (1980); West Texas Hotels, Inc., d/b/a Midland Hilton and Towers, 324 NLRB 1141 (1997). In the instant matter, Shnay's testimony was wholly uncorroborated, even though the Employers could have tried to corroborate it by Miguel's testimony, by Genzer's testimony and/or by documentary evidence. Under these circumstances, I find that the Employers' hearsay evidence is inadmissible and falls far short of proving that the superintendent actually possesses or exercises the authority to hire, discipline or discharge employees, or effectively to recommend such action. *See also* District No. 1, Marine Engineers' Beneficial Association (Dutra Construction Co.), 312 NLRB 55 (1993)(Respondent failed to meet burden of proving supervisory status by submitting an affidavit from a witness not shown to be unavailable).

The record further establishes that Miguel does not have authority to promote, transfer or reward employees. In short, the record contains no substantial evidence that

the superintendent possesses any of the supervisory powers enumerated in Section 2(11) of the Act. Furthermore, he does not attend the weekly management meetings at the AMS office in Great Neck. Although Shnay testified that Miguel's compensation is slightly greater than that of other unit employees, such a "secondary" criterion is insufficient to prove his supervisory status, absent proof of the "primary" statutory criteria. Finally, given the frequent presence of site manager Genzer, finding Miguel to be a statutory supervisor would result in a relatively high supervisory ratio, i.e., two supervisors for a unit of only 10 employees.

Based on the foregoing, I find that the Petitioner has not met its burden under Tuscan Gas, supra, of proving that the superintendent is a supervisor as defined in Section 2(11) of the Act. That classification will therefore be included in the bargaining unit.

Clerical employee

As noted above, the Petitioner essentially seeks a "wall-to-wall" or "plant-wide" bargaining unit of non-supervisory employees at the Sutter Gardens site, including the clerical employee along with the maintenance employees. By contrast, the Employers contend that the clerical employee does not share a community of interest with the maintenance employees, and therefore cannot appropriately be included in the unit with them.

The one clerical employee, Martha Salce, works primarily in the Sutter Gardens office at 425 Schenck Avenue. She has a desk there. She reports to the site manager at Sutter Gardens, as well as the AMS office in Great Neck. Salce works Monday through Friday, generally from 9:00 AM to 4:00 PM. However, her hours are somewhat flexible

because she sometimes has to leave early to attend college courses. She works an average of 35 to 40 hours per week. Salce is paid on an hourly basis, although the record does not indicate her exact rate. She is eligible for the same Christmas bonus as other petitioned-for employees. She, like them, does not have medical benefits. The record does not indicate whether she receives any paid vacation time. She does not wear a uniform.

It is undisputed that Salce's duties include: answering the telephone; taking written complaints and repair-requests from tenants; helping to collect paperwork regarding tenants' Section 8 certification and annual recertification; forwarding the paperwork to AMS' main office; and maintaining files. Salce also testified that she orders materials and tools. There were some discrepancies between Shnay's testimony[11] and Salce's testimony on other issues. Although Shnay testified that Salce does not perform any "porter" work, Salce testified that she performs some minor cleaning, such as sweeping and taking garbage out of the office and nearby lobby. Similarly, although Shnay testified that Salce does not perform superintendent work, Salce testified that she sometimes oversees and inspects the handymen's work in the superintendent's absence. Salce also stated that, although most work assignments are distributed by the superintendent or site manager, she sometimes asks porters to clean a particular site, or handymen to make a minor repair. (Major repair-orders must go through the superintendent.) As noted above, Salce also stated that she helps "schedule" the

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[11] During cross-examination, Shnay admitted to facts showing that his observation of Salce's work has been limited. Specifically, he visits the Sutter Gardens site only once or twice per month, such as when he has to look at a boiler or roof that needs repair. Shnay stated: "If I go into the office, I'll say hello to her [Salce] or whatever, but I really don't observe what she's doing at that point." As of the instant hearing in March 1999, Shnay had not seen Salce at the site in a few months, since December 1998. On that

handymen's work to a certain extent, by arranging and prioritizing the written repair orders at her desk. Schnay admitted that, in Salce's absence, the superintendent sometimes performs her work, specifically of taking complaints from tenants. Finally, although Shnay "assumed" that Salce has no direct, work-related contact with porters and handymen, Salce testified that she has daily contact with these maintenance employees, such as when they come to her desk to pick up the work orders. She sometimes talks to them about the work orders.

The Board has held that a plant-wide unit is presumptively appropriate, as "a community of interest inherently exists among such employees." Kalamazoo Paper Box Corp., 136 NLRB 134, 136 (1962); Airco, Inc., 273 NLRB 348, 349 (1984). *See also* American Publishing Co. of Michigan, d/b/a The Evening News, 308 NLRB 563, 567 (1992). If an employer seeks to exclude a given classification from a plant-wide unit, it has the burden of demonstrating that that classification's interests are so disparate from the other employees that they cannot be represented in the same unit. Airco, Inc., supra, 273 NLRB at 349. In the instant case, the record indicates that Salce is supervised by the same site manager as the maintenance employees; that her work in writing the repair orders is functionally integrated with the handyman's repair work; that there is some interchange and regular contact between Salce and the other classifications; that she works substantially similar hours; and that she is an hourly employee with the same benefits as the maintenance employees. The mere fact that Salce performs primarily clerical work in the office, rather than maintenance work in the apartment buildings, does not make her interests so disparate as to render inappropriate her inclusion in a wall-to-

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occasion, when he went to the office for 15-30 minutes, he saw that Salce was talking to various tenants.

wall unit. Rather, her job classification is akin to a "plant clerical" classification, whose work is functionally related to the maintenance employees' work. Accordingly, I find that the Employers in this case have not rebutted the presumptive appropriateness of the petitioned-for, plant-wide unit which includes this clerical employee.

Moreover, it should be noted that Salce happens to be the only employee in her classification at Sutter Gardens. Since there are no other clerical employees with whom she could form a separate bargaining unit, her exclusion from the petitioned-for unit would effectively deny her the opportunity to be represented in any collective bargaining, a result which the Board disfavors. Vecellio & Grogan, Inc., 231 NLRB 136 (1977). *See also* MDS Courier Services, Inc., 242 NLRB 405 (1979); United Dairy Farmers Cooperative Assn., 242 NLRB 1026, 1055 (1979); and Gateway Equipment Co., Inc., 303 NLRB 340, 342 (1991).

Based on the foregoing, I find that the petitioned-for wall-to-wall unit, specifically including the clerical employee, is appropriate.

Painter(s)

The Petitioner herein seeks to represent "all superintendents, porters, handymen and *other maintenance employees*" (emphasis added). When asked during the hearing if the Petitioner was specifically aware of any other maintenance classifications, the Petitioner responded that "there is a painter," although no painter was identified by name on the record. The Employers asserted that there are independent contractors who periodically paint the apartment buildings. The only evidence in the record is some

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Shnay estimated that, in the past six months, he observed Salce's work for a total of one or two hours.

testimony from Shnay. Neither the Employers nor the Petitioner called any painters to testify.

Shnay testified that the Employers do not employ painters on a regular basis. Rather, there are "a couple of different individuals" who "come and go" as needed. Specifically, whenever there is an eviction or an otherwise vacant apartment, a painter is called to paint the apartment. Occasionally, the hallways are also painted. Shnay declined to estimate how often the painters paint, other than to say they are "irregular".

The painters are paid a "flat rate" for the work (i.e., per room or per hallway), not by the hour. The Employers do not carry workers' compensation insurance for these individuals, and do not deduct or withhold their taxes. Shnay also testified that although the painting is usually a "one-man job," a painter may bring helpers to work on bigger jobs. The Employers still pay the same flat rate for the work; they do not pay extra for the helpers.

To Shnay's knowledge, the people who paint at Sutter Gardens do not operate under a business name but, rather, "as individuals." The Employers supply the tools, brushes and paint, whereas the painters supply the labor. There was no evidence in the record regarding the extent of control which the Employers exercise over the details of the work

To determine independent contractor or employee status under Section 2(3) of the Act, the Board applies the principles of agency under common law, including the right-to-control test. The determination requires a very detailed analysis of the facts of each case. In the instant case, the Employers have provided some evidence tending to show that the painters at Sutter Gardens may be independent contractors, e.g., that they

are paid by the job rather than by the time, and that they may hire their own helpers. However, the Employers failed to establish other important factors, such as whether the painters work under the direction of the Employers; whether the Employers control the means to be used in achieving the desired end; and the frequency and duration of the painters' work. In short, the Employers have not provided sufficient evidence to determine that the painters are independent contractors in this case.

However, even assuming *arguendo* that the painters are employees, it must also be noted that Petitioner failed to present any evidence whatsoever that the painters are at least regular, part-time employees, as opposed to truly sporadic or casual employees who do not share sufficient interest in the unit's conditions of employment to warrant inclusion. For example, although the Petitioner identified someone named Luis Florentin as "the painter" in its post-hearing brief, Petitioner did not call that person to testify. The Petitioner did not subpoena any payroll records or other records from the Employers regarding the status of the painter(s) and the regularity of his/their employment. And the Petitioner did not solicit any testimony from its one witness, Martha Salce, regarding the regularity of employment of any painter or painters. Under the circumstances, I am unable to find that there are any painters employed by the Employers on at least a regular, part-time basis at Sutter Gardens. I therefore decline to include painters in the bargaining unit.

Accordingly, I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees, including superintendents, handymen, porters and clerical employees, employed by the Employers at

their 425 Schenck Avenue, Brooklyn, New York facility, but excluding all guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 32E, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon

Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before April 9, 1999. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by April 16, 1999.

Dated at Brooklyn, New York, this 2nd day of April, 1999.

/S/ ALVIN BLYER

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
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